



United States Department of the Interior

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FISH AND WILDLIFE SERVICE

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February 22, 2006

The Honorable Joan Kinney
Mayor of Boiling Spring Lakes
9 East Boiling Spring Road
Boiling Spring Lakes, NC 28461

Dear Mayor Kinney:

This letter summarizes events to date and provides additional information regarding the occurrence of the federally listed endangered red-cockaded woodpecker (*Picoides borealis*; RCW) on private lands within the City of Boiling Spring Lakes, Brunswick County, North Carolina. The Fish and Wildlife Service (Service) first met with city and county officials, the North Carolina Wildlife Resources Commission (NCWRC), and a representative of Congressman Mike McIntyre's office on December 13, 2005, to inform all parties regarding this matter. Following that meeting I spoke to the full City Commission at your January 3, 2006 meeting. We followed that meeting with a city commission workshop on January 19, 2006, and a follow-up meeting on January 26, 2006. I thank you and the city commission for your patience and willingness to work with us on this important issue.

We have indicated that approximately 15 active RCW clusters are distributed on private lands throughout the city. A RCW cluster is the aggregate of cavity trees (with a 200 foot buffer around that aggregate) occupied and defended by a group (typically 1-4 birds) of RCWs. These groups of RCWs are dependent on foraging and nesting habitat on residential lots in Boiling Spring Lakes. This occupied habitat likely encompasses several thousand developed and undeveloped lots within the City. We have observed the rapid pace of development within the city recently and are concerned that continued land clearing associated with residential and commercial construction (particularly the cutting of mature pine trees upon which this species depends) may lead to inadvertent violations of the Endangered Species Act (ESA) by private property owners. Further, the City's issuance of building permits which lead to the clearing of mature pine trees may be contributing to the "take" of RCWs; thereby exposing the City to potential liability under the ESA.

As discussed during our previous meetings, the ESA prohibits the "take" of listed species, defined under Section 9 as actions that harm, harass, pursue, hunt, shoot, wound, trap, capture, collect, or kill a species. Most of these terms are commonly understood. However, the terms "harass" and "harm" have been further defined by Service regulations at 50 CFR §17.3. Harass means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering. Harm means an act which actually kills or injures wildlife. Such acts may include significant habitat modification or degradation when it actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding or sheltering. "Incidental" take is defined by the ESA as take that is "...incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." There are substantial civil and criminal penalties for taking a listed species. Additionally, any person may bring a citizen suit against any other person to enjoin an ESA taking. The citizen suit must be preceded by 60 days written notice of intent to sue.

The forms of "take" which may occur in the municipality of Boiling Spring Lakes include (but are not limited to) the cutting of RCW cavity trees and the removal of RCW foraging habitat (mature pine trees) as described in the Service's Red-cockaded Woodpecker (*Picoides borealis*) Recovery Plan: Second Revision (Service 2003; Recovery Plan). Take may also occur in the form of harassment if, for example, construction activities are occurring in an RCW cluster, i.e., within 200 feet of active cavity trees.

As discussed during our meetings, our goal is to work cooperatively with the city, county and other partners to ensure that development proceeds within the city in accordance with the ESA, while minimizing the onus of ESA compliance on individual property owners. Achieving this goal will require that we continue work together closely and expeditiously to develop and implement an appropriate regulatory vehicle for authorizing incidental take of RCWs related to construction activities. Additionally, in the interim we plan to provide timely information and assistance to landowners to hopefully prevent individuals from inadvertently running afoul of the ESA. We wish to minimize, to the greatest extent possible, the need for individual property owners to independently navigate what is admittedly a complex set of federal laws and regulations.

We also feel it is important to reiterate that Boiling Spring Lakes is not being "singled out" for enforcement action. The current situation in the city is the result of the particular natural history of the area. The RCW depends on mature healthy longleaf pine forests for its survival. By "healthy" we mean that the forest maintains an open character with a predominantly grassy and herbaceous understory with few other trees (e.g., few or no oak trees). While there is an abundance of pine forests and pine plantations in Brunswick County, and throughout the southeast United States, the vast majority of the "old growth" longleaf pine forests have long-since been eliminated. Much of what remains has become overgrown with oaks and other species which renders the forest unsuitable for RCW. There are few places where substantial longleaf pine forests remain outside of State and Federal lands, and selected private lands. However, as a result of historic land use practices, a relatively healthy longleaf pine forest has continued to persist within what is now Boiling Spring Lakes, which also means that it is one of the few places on private lands where RCW continue to exist. This, combined with the recent rapid pace of development within the city has created the current dilemma.

Potential Regulatory Options

Section 10(a)(2)A of the ESA enables a non-federal entity to apply for an Incidental Take Permit (ITP). Once an ITP is issued by the Service, landowners can proceed with developing their property, including activities that would cause incidental take of listed species. The application process requires the development of a Habitat Conservation Plan (HCP) to offset any harmful effects the proposed activity might have on the species.

While individual property owners can apply for and obtain an ITP, the process can be somewhat complicated, lengthy, and entail considerable expense to the landowner. Because of the large number of affected properties involved in this case, we anticipate that processing a large volume of individual ITP applications would result in substantial additional delays.

We believe that both endangered species conservation and the citizens of Boiling Spring Lakes would best be served by a citywide or countywide HCP and associated ITP. In this way a single permit could be issued to the city or county that would authorize incidental take of RCWs by anyone conducting otherwise lawful activities throughout the area covered by the permit. We feel that this approach would provide the most cost effective and timely means to secure continued growth in the community while effectively conserving RCWs.

We have also had some discussions regarding the possible applicability of a Safe Harbor Agreement. Safe Harbor Agreements are voluntary arrangements between the Service and cooperating non-Federal landowners. This policy's main purpose is to promote voluntary management for listed species on non-Federal property while giving assurances to participating landowners that no additional future regulatory restrictions will be imposed. The agreements benefit endangered and threatened species while giving landowners assurances from additional restrictions. Following development of an agreement, the Service issues an "enhancement of survival" permit, to authorize any necessary future incidental take to provide participating landowners with assurances that no additional restrictions will be imposed as a result of their conservation actions. The Service provides assurances that, when the agreement's term ends, the participating landowner may use the property in any otherwise legal manner that does not move it below baseline conditions determined in the agreement. These assurances operate with the enrolled lands and are valid for as long as the participant is complying with the Safe Harbor Agreement and associated permit.

The first Safe Harbor Agreement was implemented in the Sandhills region of North Carolina and has been very successful in promoting endangered species conservation. We are also in the process of developing a Statewide RCW Safe Harbor Agreement with the WRC. Once approved, the statewide agreement would be available to private landowners interested in supporting RCW conservation on their lands throughout the range of the species in North Carolina.

While the Safe Harbor program is a valuable conservation tool for private landowners, it may not be the right tool for the job in Boiling Spring Lakes. As noted above, a Safe Harbor Agreement and accompanying permit encourage conservation of listed species, and authorizes "take" of those species, above a "baseline." In the case of Boiling Spring Lakes the baseline would be approximately 15 RCW clusters. If it were the intention of city leaders to maintain this baseline within the city and undertake conservation efforts above the baseline, then a Safe Harbor Agreement for the city, or your participation in the Statewide RCW Safe Harbor Agreement, would be a good fit. However, the current pace of development in the city and the desire for continued growth makes it more likely that there will be a loss of RCW habitat and clusters over the coming years. This means that the city and its residents would be best served by seeking authorization for "take" of RCWs below the current baseline, which can be accomplished through the HCP process. The above notwithstanding, all options remain open and we are eager to explore any and all alternatives with you, the other city leaders, and other partners.

Issues Warranting Consideration as We Move Forward

Information about the RCW has been provided to you previously, including information about HCPs, the Recovery Plan and a volume entitled *Red-cockaded Woodpecker: Road to Recovery* (Costa and Daniels 2004). We wish to summarize some of the more important aspects of RCW life history that will be particularly relevant to the situation in Boiling Spring Lakes. It is important to note that not all development activities in Boiling Spring Lakes are likely to result in take of RCW. Site specific determinations regarding the effects of development on RCW depends in part on where the development is occurring relative to RCW cavity trees and the amount and quality of nesting and foraging habitat available within each territory.

The principal resource upon which the RCW depends is its cavity tree. A cavity that the RCW excavates in a live pine tree may take months or years to complete. Once the cavity is completed, it serves as a nightly shelter for a single bird and may also be used for nesting during the breeding season. The aggregation of cavity trees plus a 200-foot buffer around it is referred to as a cluster (See figure 1).

Because of the RCW's substantial investment of time and energy in the excavation of cavities they show a high degree of fidelity to their territory. They do not migrate and their territories tend to remain relatively unchanged from year to year. As a result, even relatively small impacts to RCW habitat can result in incidental take, as the species does not generally have the ability to simply move to a better location.

Aside from cavity trees, the next most important habitat component to RCW conservation is foraging substrate – live pine trees. The Standard for Managed Stability (Appendix 5 of the Plan) outlines the basic characteristics of RCW foraging habitat. The essential resources are pine trees greater than or equal to (\geq) 10 inches diameter at breast height (4.5 feet above the ground; DBH). For an RCW territory (or foraging partition) to remain biologically functional, a minimum of 3,000 square feet of basal area¹ in pine stems \geq 10 inches DBH on a minimum of 75 contiguous acres must be retained. Timber stands counted as foraging habitat should be within a 0.25-mile radius of the cluster epicenter but must be within 0.5-mile radius (See Figure 2). As such, some land clearing can occur within an RCW territory without constituting incidental take, so long as it does not reduce the amount of foraging habitat to less than 75 contiguous acres. Based on the information collected to date, it appears that more than 75 acres of contiguous foraging habitat exists within each of the currently active foraging partitions within the city. As such, at this point the clearing of foraging habitat would not appear likely to result in the "take" of RCWs, and does not require prior authorization by this office. We ask that you continue to keep us informed on a monthly basis of the number and location of issued land clearing permits, so that we can continue to monitor the availability of foraging habitat to ensure that at least 75 acres of suitable habitat remains available within each active foraging partition.

Human activities within the cluster have a greater potential to affect RCWs than do those occurring in foraging habitat outside the cluster. Tree removal can be authorized within the cluster without incurring incidental take but a specified density of mature pines (e.g., retention of all pines greater than 60 years in age within the cluster, unless pine basal area exceeds 50 ft²/ac and all trees are above 60 years in age) should be retained. There may be a requirement to avoid certain activities during the breeding season (March – July) within the cluster depending on the proximity of the disturbance to nesting RCWs. Because these determinations obviously require a certain amount of technical knowledge, we recommend that land owners contact this office at the number below prior to conducting any tree cutting or construction within a cluster.

Over the years, we have seen various examples of RCWs acclimating to human activities (e.g., living on golf courses and military installations with intensive training). However, some human activities can be disruptive to vital lifecycle requirements depending on the time of year (e.g., nesting season) and proximity to cavity trees.

The most serious effects of human disturbance pertain to environmental change associated with pine tree loss and increased presence of hardwood midstory (e.g., small to medium sized oaks, maples, and sweetgums growing under the canopy of pines). RCWs generally thrive in open forested habitat with sparse or no hardwood midstory, especially within the cluster. They will abandon territories where hardwood trees grow densely into the forest sub-canopy.

All the above factors (and others) will need to be considered in preparation of an HCP (whether a single citywide or countywide HCP or numerous individual HCPs). The plan(s) will need to include

¹ Basal area is a measure of timber stand density; the area of a horizontal cross section of a tree's stem, generally measured at breast height, expressed in square feet (ft²).

the short-term reduction of adverse species affects (e.g. working with individuals to conserve portions of mature pine stands, construction timing, provisioning artificial replacement cavities, etc.) and the determination and mitigation of long term effects. Community development could eventually cause the substantial reduction or demise of the local RCW population. Preparation of the HCP will need to consider this potential and establish the means by which the loss of each group can be offset. Guidance for mitigating loss of RCW groups is contained in the Recovery Plan.

The Path Forward

As indicated above, the ESA provides ways to address situations such as this, and we stand ready to work with and assist the landowners of Boiling Spring Lakes, the city and the county. In our view the most prudent course of action would be the development of a citywide or countywide HCP.

In the interim period preceding completion of an HCP(s) and ITP(s), we believe a certain amount of development can proceed without causing take of RCW. We have provided the city with maps indicating the location of known active clusters. Enclosed are lists of the properties located wholly or partially within those clusters. To ensure that ongoing development is consistent with the ESA, we recommend the city not issue land clearing or building permits within these clusters until appropriate authorizations have been granted by the Service. The Service will conduct a site-specific review of each property located within a cluster (upon request of the property owner) to determine the proper course of action for development of the property in compliance with the ESA. It is likely that site-specific review of most properties within active clusters will result in a conclusion that any land clearing on the property would result in take of RCW, and therefore should not proceed without an ITP. However, in certain uncommon cases, it may be possible to conclude (based on site-specific characteristics of the property) that certain activities could occur within the cluster without resulting in take of RCW. We will document any such cases we discover in writing and provide such documentation to the property owner and the city.

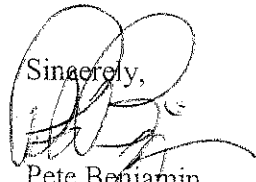
Foraging habitat removal inside foraging partitions (but outside of clusters) associated with construction may proceed without an ITP until the minimum total acreage of contiguous pine-forested habitat is reached (about 75 acres). To be clear, while it is our view that only the few hundred properties identified on the enclosed lists (i.e., those within active clusters) are of immediate concern with respect to the risk of take of RCW, as development proceeds and additional foraging habitat is lost, the potential that several thousand additional properties will be directly affected increases. As such, the sooner we can arrive at a comprehensive solution the better.

In the short-term, the cutting of RCW cavity trees associated with development in Boiling Spring Lakes is a concern to our agency. The Service is ready to assist the city in minimizing the likelihood that cavity trees may be cut by informing landowners of the presence of federally protected species on their property. We can also respond to individual property owners regarding any concerns related to specific properties, as stated above. Due to the vast number and distribution of affected properties within foraging partitions and the immediate, rapid changes occurring on the landscape, we recommend that the City hire a consultant to assist it in reviewing building permits, tracking all pine tree removals, monitoring the effects of development on the RCW population, approaching regional partners to establish potential mitigation/conservation banks, and preparing the HCP. Enclosed is a list of current holders of scientific permits related to the RCW. As indicated during our December 13, 2005 meeting, this list is not exhaustive and only includes holders of scientific permits. There are other contractors with the expertise to prepare an appropriate HCP.

The process of preparing and approving an HCP can be expected to take a year or more. The HCP should account for loss of RCW groups associated with the city's growth and enable the residents of Boiling Spring Lakes to conduct normal, city-approved development activities on their properties in compliance with the ESA. A generalized list of steps in the process was provided at the January 19. As indicated during the workshop, given the unprecedented scope of this issue (in terms of the number of RCW groups and private landowners potentially affected) the Service and NCWRC have offered to take the unusual step of preparing many of the documents associated with the HCP on the city's behalf. While the Service will assist you in the preparation of this package, we are limited in terms of staff resources, and the process would be greatly expedited if the city took an active role in preparing the documents. Otherwise, the complexity of the issues related to this process is likely to cause some delays in development activities at Boiling Spring Lakes as well as loss of opportunity to establish effective mitigation for loss of RCW groups. With respect to mitigation, the Service, NCWRC, and our conservation partners are currently attempting to identify potential mitigation options, both locally and throughout the region. It is our experience that the appropriate amount and type of mitigation necessary for HCPs such as this is one of the primary drivers in determining the overall cost of developing and implementing the HCP. As such, we cannot at this time provide a reasonable estimate of the cost to the city of preparing and implementing an HCP. We will continue to work with the City on this issue.

Our mission is to conserve, protect and enhance fish and wildlife and their habitats for the continuing benefit of the American people. The Service is committed to conserving federally listed species while working to meet the needs of North Carolina's citizens. Continued cooperation among all parties involved will be essential to achieving these objectives, and again I thank you for your willingness to work with us in this important endeavor.

If you have any questions regarding this matter, please contact me at 919-856-4520 (extension 11) or Mr. John Hammond of my staff extension 28. To assist individual property owners, we have a dedicated phone line established in this office. Please refer property owners and concerned citizens to 919-856-4520 (extension 12). Ask them to leave a message with their name, property address and tax ID number, and a daytime telephone number. Someone from this office will contact them within 2 business days to discuss their situation. Also, we have established a link on our website (<http://nc-es.fws.gov/BSLIndex.html>) that provides additional information regarding RCWs, the HCP process, and the Boiling Spring Lakes issue that we encourage folks to visit for updated information.

Sincerely,

Pete Benjamin
Ecological Services Supervisor

Enclosures

cc: Ralph Costa, USFWS
Mary Ellen Simmons, Congressman McIntyre
Dave Allen, NCWRC
Jenna Begier, NCWRC
City Commissioners
Brunswick County Commissioners

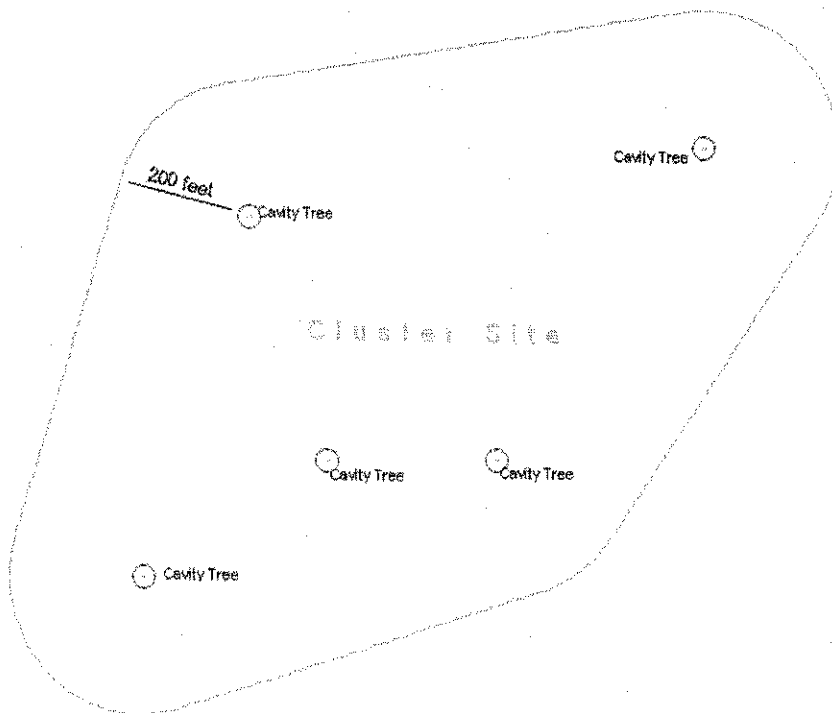


Figure 1: RCW Cluster

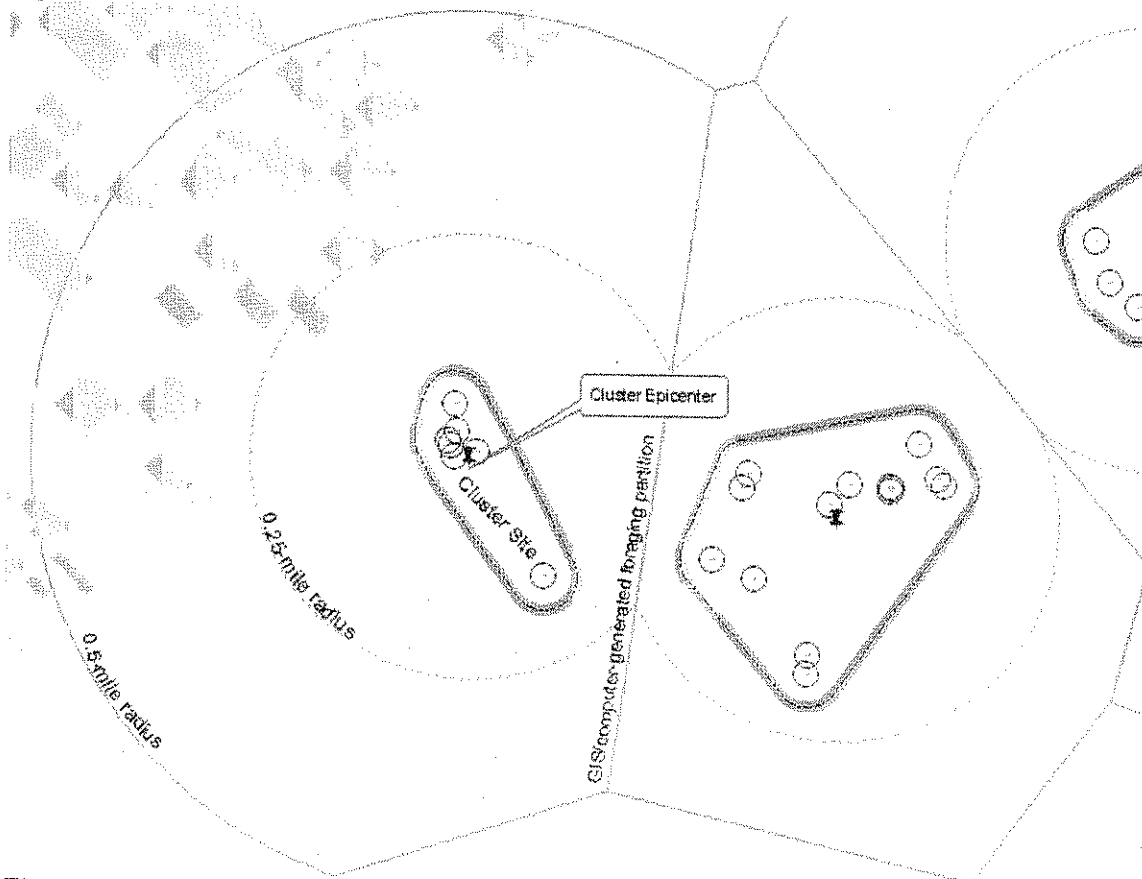


Figure 2: RCW Foraging Partitions